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UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA

ROBERT TUR d/b/a LOS ANGELES)
 NEWS SERVICE,)
)
 Plaintiff,)
)
 vs.)
)
 YOUTUBE, INC.)
)
 Defendant.)

CV 06-4436 FMC (AJWx)

ORDER DENYING PLAINTIFF'S
 MOTION FOR SUMMARY
 ADJUDICATION OF DEFENDANTS
 FIRST AFFIRMATIVE DEFENSE OF
 DMCA SAFE HARBOR

#81

This matter is before the Court on Plaintiff's Motion for Summary Adjudication of Defendant's First Affirmative Defense of DMCA Safe Harbor, (docket no. 16). The Motion came on regularly for hearing before the Court on June 18, 2007. The parties were in possession of the Court's Tentative Ruling. Upon consideration of the parties submissions, brief by amicus, the arguments of counsel and the case file, the Court hereby DENIES Plaintiff's Motion.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Plaintiff Robert Tur ("Plaintiff" or "Tur") is an award-winning helicopter pilot and journalist who does business under the name Los Angeles News Service ("LANS"). (Pl.'s Stmt. of Genuine Issues ¶ 19; Def.'s Stmt. of Genuine

1 Issues ¶ 1.) LANS licenses and sells news video, videotapes, photographs, and
2 other products used by other news operations for all media, including television,
3 cable, motion pictures, the Internet, and print media. (Def.'s Stmt. of Genuine
4 Issues ¶ 3.) Tur owns copyrights in certain videotaped footage of newsworthy
5 events which took place in the early 1990s, including footage of the beating of
6 truck driver Reginald Denny at the commencement of the infamous 1992 Los
7 Angeles riots. (Decl. of Tur ¶ 4; Def.'s Stmt. of Genuine Issues ¶ 5.)

8 Defendant YouTube, Inc. ("Defendant" or "YouTube") operates a website
9 where users may post audio-visual content for viewing via "streaming." (Def.'s
10 Stmt. of Genuine Issues ¶ 4.)¹ The website currently contains more than ten
11 million video clips and is accessed by tens of millions of users a month. (Decl.
12 of Chen ¶ 3; Pl.'s Stmt. of Genuine Issues ¶ 2.) YouTube does not charge its
13 users to upload or view clips. (Decl. of Chen ¶ 3, Pl.'s Stmt. of Genuine Issues ¶
14 4.)

15 On July 14, 2006, Tur filed this action for copyright infringement and
16 unfair competition against YouTube, claiming that clips of his copyrighted video
17 footage had been uploaded to the website and viewed by and/or distributed to the
18 public without his authorization. Tur seeks both damages and injunctive relief.
19 YouTube filed its Answer on October 11, 2006.

20 Plaintiff's Motion asks this Court to determine that YouTube does not
21 qualify for "safe-harbor" protection, because it does not meet one of the myriad
22 statutory elements required to qualify for safe harbor protection under the Digital
23 Millennium Copyright Act ("DMCA") codified at 17 U.S.C. § 512(c).

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26 ¹As YouTube's founder explains, this content includes home-made footage of all sorts,
27 from stand-up routines to video diaries, delivery-room footage, amateur musical performances,
and eyewitness footage from Hurricane Katrina and the Iraq War. Decl. of Chen at ¶ 6 .

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STANDARD OF LAW

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party bears the initial responsibility of informing the court of the basis of its motion, and identifying those portions of “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,” which it believes demonstrate the absence of a genuine issue of material fact.” *Celotex Corp v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) (quoting Fed. R. Civ. P. 56(c)). Where the nonmoving party will have the burden of proof at trial, the movant can prevail merely by pointing out that there is an absence of evidence to support the nonmoving party’s case. *See id.*; *see also Nissan Fire & Marine Ins. Co. v. Fritz Companies, Inc.*, 210 F.3d 1099, 1106 (9th Cir. 2000) (“In order to carry its burden of production, the moving party must either produce evidence negating an essential element of the nonmoving party’s claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its burden of persuasion at trial.”). If the moving party meets its initial burden, the nonmoving party must then set forth, by affidavit or as otherwise provided in Rule 56, “specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

The substantive law governing a claim determines whether a fact is material. *T.W. Elec. Serv. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987); *see also Long v. County of Los Angeles*, 442 F.3d 1178, 1185 (9th Cir. 2006) (“Material facts are those which may affect the outcome of the

1 case.”) (internal citations omitted). In judging evidence at the summary
2 judgment stage, the Court does not make credibility determinations or weigh
3 conflicting evidence and draws all reasonable inferences in the light most
4 favorable to the nonmoving party. *T.W. Elec. Serv.*, 809 F.2d at 630-31; *see also*
5 *Brookside Assocs. v. Rifkin*, 49 F.3d 490, 492-93 (9th Cir. 1995). The evidence
6 presented by the parties must be admissible. Fed. R. Civ. P. 56(e). Mere
7 disagreement or the bald assertion that a genuine issue of material fact exists
8 does not preclude the use of summary judgment. *Harper v. Wallingford*, 877
9 F.2d 728, 731 (9th Cir. 1989).

10 DISCUSSION

11 I. The DMCA and Congressional “Safe Harbors”

12 Title II of the DMCA, also known as the Online Copyright Infringement
13 Liability Limitation Act (“OCILLA”), was enacted in 1998 “to facilitate
14 cooperation among Internet service providers and copyright owners ‘to detect and
15 deal with copyright infringements that take place in the digital networked
16 environment.” *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004)
17 (quoting S. Rep. 105-190, at 20 (1998); H.R. Rep. 105-551, pt. 2, at 49 (1998)).
18 It provides for four distinct “safe harbors,” under which the liability of an online
19 service provider may be strictly limited to prospective injunctive relief, in the
20 form of blocking ongoing access to the infringing content. 17 U.S.C. §§ 512 (a)-
21 (d), (j).² As the Ninth and other judicial circuits have recently noted, the
22 OCILLA does not purport to create separate standards for assessing claims of

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25 ²The four “safe harbor” provisions are directed to (1) transitory digital network
26 communications, 17 U.S.C. § 512(a); (2) system caching, 17 U.S.C. § 512(b); (3) information
27 residing on systems or networks at the direction of users, 17 U.S.C. §512(c); (4) information
28 location tools, 17 U.S.C. §512(d).

1 copyright infringement against online entities, but rather provides a partial
2 defense thereto upon a showing that all of the statutory prerequisites (discussed
3 below) are met. *See Ellison*, 357 F.3d at 1077 (“Far short of adopting enhanced
4 or wholly new standards to evaluate claims of copyright infringement against
5 online service providers, Congress provided that OCILLA’s ‘limitations of
6 liability apply if the provider is found to be liable *under existing principles of*
7 *law.*”) (quoting S. Rep. 105-190, at 19) (emphasis in *Ellison*)); *CoStar Group,*
8 *Inc. v. LoopNet, Inc.*, 373 F.3d 544, 555 (4th Cir. 2004) (“The DMCA has merely
9 added a second step to assessing infringement liability for Internet service
10 providers, after it is determined whether they are infringers in the first place under
11 the preexisting Copyright Act.”).

12 **II. Tur’s Motion**

13 Tur’s motion is predicated on YouTube’s purported inability to establish
14 just one of these elements, to wit, its non-receipt of any “financial benefit” as a
15 result of the alleged infringing activity under 17 U.S.C. § 512(c)(1)(B). Tur
16 alleges that YouTube necessarily received a financial benefit from allowing its
17 users to upload and view his copyrighted footage, because it displays “banner
18 advertising” during the time that clips are played. (*See Pl.’s Mot.* at 8; *Pl.’s*
19 *Opp’n* at 3.) However, as the statute makes clear, a provider’s receipt of a
20 financial benefit is only implicated where the provider also “has the right and
21 ability to control the infringing activity.” 17 U.S.C. § 512(c)(1)(B), *See Perfect*
22 *10, Inc. v. CCBill LLC.*, 2007 WL 1557475 at *11. Tur has not presented any
23 evidence to the Court, despite numerous opportunities to do so, that establishes
24 that YouTube had the right and ability to control the allegedly infringing activity.
25 Accordingly, Tur’s Motion is DENIED.

FILED

1 **III. CONCLUSION**

2 Tur's motion for summary judgment (docket no. 16) is DENIED.

3 **IT IS SO ORDERED.**

4 June 20, 2007



FLORENCE-MARIE COOPER, Judge
UNITED STATES DISTRICT COURT

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